Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 06-___

In the Supreme Court of the United States

M2 SOFTWARE, INC.,
Petitioner,

v.

MADACY ENTERTAINMENT, *et al*,
Respondents

M2 SOFTWARE, INC.,
Petitioner,

v.

M2 COMMUNICATIONS, LLC, *et al*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARK L. PETTINARI
Counsel of Record
LAW OFFICES OF MARK L. PETTINARI
Stock Exchange Tower
155 Sansome Street, Suite 400
San Francisco, CA 94104
Tel (415) 240-4200
Attorney for Petitioner
M2 SOFTWARE, INC.

QUESTION PRESENTED

1. Whether this Court should grant certiorari on the narrow but recurring federal question of whether a Judge in a Court of Appeals must reassign a motion alleging an appearance of bias under 28 U.S.C. § 455 to a new impartial Judge or panel, where conflict considerations have made a Judge's reassignment of such motions a statutory requirement under 28 U.S.C. § 144 in the District Courts.

RULE 29.6 STATEMENT

Petitioner is M2 Software, Inc. (hereinafter "M2"). Petitioner has no parent corporation and there is no publicly held company owning 10% or more of Petitioner's stock.

Respondents are M2 Communications, LLC, Gaylord Entertainment, and Jeff Moseley [in *M2 Software, Inc. v. M2 Communications, et al* (U.S.C.A. 03-56602) (hereinafter *"M2 Communications"*)], and Madacy Entertainment, Handleman Company, and SFX Entertainment (now Clear Channel Entertainment) [in *M2 Software, Inc. v. Madacy Entertainment, et al.* (U.S.C.A. 03-55957) (hereinafter "*Madacy*")].

Pursuant to Supreme Court Rule 12.4, a single Petition for a Writ of Certiorari is submitted for the above actions on the grounds that the Orders sought to be reviewed involve the same court and an identical question.

Other Parties with a Financial Interest in the Outcome of this Proceeding:

Time Warner, Inc.
Warner Music Group
Clear Channel Entertainment
Viacom, Inc.
Viacom International, Inc.
MTV Networks Company

A Petition for a Writ of Mandamus in the present cases has been concurrently filed. A different Petition for a Writ of Certiorari in a related case may be affected by the outcome of this Petition. *M2 Software, Inc. v. M2 Communications, Inc.* (U.S.S.C. 06-515).

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Petitioner M2 Software, Inc. (hereinafter "M2"), requests that this Court issue a Writ of Certiorari to review the narrow but recurring federal question of whether a Judge in a Court of Appeals must reassign a motion alleging an appearance of bias under 28 U.S.C. § 455 to a new impartial Judge or panel.

OPINIONS BELOW

The published Order of the Ninth Circuit in *M2 Software, Inc. v. M2 Communications, et al* (U.S.C.A. 03-56602) is reported at 463 F.3d 868) and reproduced in the Appendix hereto ("App.") at 1a. The published Order of the Ninth Circuit in *M2 Software, Inc. v. Madacy Entertainment, et al* (U.S.C.A. 03-55957) is reported at 463 F.3d 870 and reproduced in the Appendix at 4a. A single Petition is submitted for a Writ of Certiorari in these cases because they concern nearly identical Orders decided by the same panel of judges and raise an identical question for review. *See* Sup. Ct. Rule 12.4.

JURISDICTION

The court of appeals entered its published Orders on August 21, 2006. The court of appeals denied M2 Software's petitions for rehearing *en banc* on October 26, 2006. App. 7a-8a. This Court's jurisdiction is based on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution [App. 13a] provides, in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

See Tumey v. Ohio, 273 U.S. 510, 523, 534 (1927); *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) ("an impartial judge is essential to due process").

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455 [App. 14a] provides, in pertinent part, that a United States judge:

(a) * * * shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) * * * shall also disqualify himself in the following circumstances: * * * *

> 4) he knows that he * * * has a financial interest in the subject matter in controversy or in a party to the proceeding.
>
> 5) He * * *
>
> (i) Is a party to the proceeding * * * *
>
> (iii) Is known * * * to have an interest that could be substantially affected by the outcome of the proceeding.

(c) * * * shall inform himself about his personal * * * financial interests * * *

(d) * * * (4) "financial interest" means ownership of a legal or equitable interest, however small * * *

(e) No * * * judge * * * shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) * * *.

28 U.S.C. § 46(b) [App. 17a] requires an appellate panel of a minimum of three judges:

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges * * *. The United States Courts of Appeals * * * may determine by rule the number of judges, not less than three, who constitute a panel * * *.

28 U.S.C. §144 [App. 19a] provides, in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

STATEMENT OF THE CASE

I. Introduction and Summary

Petitioner seeks a writ of certiorari on the narrow but recurring question of whether recusal motions under 28 U.S.C. § 455 should be assigned to a different judge where an appearance of bias is alleged. A concurrent but independent petition for a writ of mandamus has been filed separately, seeking mandamus of this Court to direct the Ninth Circuit to enforce the nondiscretionary, automatic, and mandatory provisions of 28 U.S.C. § 455.

II. Background of the Case

This matter concerns a motion to recall the mandates, vacate the judgments, and reassign the appeals to a properly constituted panel in two related appeals (*M2 Communications* and *Madacy*) in which it was discovered that The Honorable Harry Pregerson, Court of Appeals Judge in the Ninth Circuit, should have been disqualified as the owner of equity in Time Warner, Inc., a real party in interest with a stake in the subject matter in controversy. The motion was filed on July 7, 2006, just 15 days after Petitioner discovered Judge Pregerson's equity stake in the cases through a *Washington Post* investigation of a judicial conflict in another case.

On August 21, 2006, in a decision noted in front-page coverage by the California legal press,[1] Judge Pregerson and the panel refused Petitioner's request to reassign Petitioner's motion and denied the motion. Judge Beezer filed a specially concurring opinion in which he concurred only as to the denial of recall of mandate, concluding the Court lacked jurisdiction to address whether Judge Pregerson was subject to enforcement of the mandatory recusal statute.

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[1] *See, e.g.*, front pages: *San Francisco Daily Journal*, Aug. 23, 2006, "9th Circuit's Pregerson Denies Stock Holdings Affected Cases"; *The Recorder*, Aug. 23, 2006, "Ninth Circuit Panel Rejects Conflict Call"; *The Recorder*, Jul. 11, 2006, "Conflict Claimed in Pregerson Rulings."

REASONS FOR GRANTING CERTIORARI

The narrow issue presented for certiorari is whether recusal motions under 28 U.S.C. § 455 should be assigned to an impartial judge where an appearance of bias is alleged. *See United States v. Ruzicka*, 329 U.S. 287, 288 (1946) (cert. granted because case "raises questions of importance in the administration of" a large federal statute). Petitioner requested that its motions be assigned to a new impartial panel to avoid a further appearance of bias. When the Ninth Circuit refused, Petitioner lodged a formal objection in both appeals.[2]

When a motion is made to recuse a District Court judge for bias, "such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144. The public policy reasons for this are obvious: "[I]f a Judge is passing upon a question of his or her own recusal, then he or she is creating an appearance of impropriety by that act alone." *People v. T&C Design, Inc.*, 680 N.Y.S.2d 832, 835 (1998). The Ninth Circuit refused Petitioner's seemingly costless request that the motion be determined by a new impartial panel. App. 1a, 4a. No Supreme Court precedent has interpreted 28 U.S.C. § 455 to determine whether a different panel should hear such motions.

Compared to a District Court motion under 28 U.S.C. § 144, it is even more problematic for a Court of Appeals Judge to self-determine a motion for his recusal under 28 U.S.C. § 455 because the statute places strict duties upon the Judge himself. *See* 28 U.S.C. § 455 (placing duty upon Judge to self-disqualify in the enumerated factually-intensive circumstances; placing duty upon Judge to remain informed about his personal financial interests and other disqualifying conflicts); *The Chase Manhattan Bank v. Affiliated FM Insurance Co.*,

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[2] *See Aplnt.'s Reply in Supp. of Motion* (7/31/2006) at 3 n.12 (requesting impartial panel); *Aplnt.'s Objection to Assignment of Recusal Motion to the Same Panel For Whom Recusal Is Sought* (8/17/2006).

343 F.3d 120, 131 (2d Cir. 2003) ("Judges therefore bear the principal burden of compliance with [§ 455(b)(4)]"); *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 868 (1988) (Judge's "failure to stay informed * * * may well constitute a separate violation of [§ 455(c)]."). A Judge who determines a motion for his own recusal is placed in the extraordinary position of determining whether his own conduct constituted violation of the statute.

The First Circuit has acknowledged the void of settled law on this issue: "Although a trial judge faced with a section 455(a) recusal motion may, in her discretion, leave the motion to a different judge, no reported case or accepted principle of law compels her to do so * * * ." *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted). The Ninth Circuit allowed Judge Pregerson and the panel to self-determine a motion that asked the Court to find Judge Pregerson in violation of section 455 for participating in, and authoring, decisions in cases in which he held a financial interest. Such a procedure in itself ignores the prohibition against an appearance of bias or impropriety by judges.

CONCLUSION

Accordingly, for the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Mark L. Pettinari
Counsel of Record
LAW OFFICES OF MARK L. PETTINARI
Stock Exchange Tower
155 Sansome Street, Suite 400
San Francisco, CA 94104
Tel (415) 240-4200
Attorney for Petitioner
M2 SOFTWARE, INC.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56602
D.C. No. CV-02-0158-AHM
Central District of California, Los Angeles

Filed August 21, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

M2 COMMUNICATIONS, L.L.C., a limited liability company; JEFF MOSELEY, an individual; GAYLORD ENTERTAINMENT, INC., a corporation, Defendants-Appellees.

****1** ORDER

Before PREGERSON, CANBY, and BEEZER, Circuit Judges.

Appellant M2 Software's motion to recall the mandate and vacate the opinion in the above case is DENIED. M2 Software's request that the recusal motion be assigned to a new panel is DENIED. M2 Communications' request for sanctions against M2 Software is also DENIED.

****2** ***869*** PREGERSON, Circuit Judge, specially concurring:

I concur in the court's order.

To set the matter straight, at the time this case was assigned to this panel and at the time we decided it, I owned an equitable interest in Time Warner. Time Warner was not a party to the suit. Unbeknownst to

me, Time Warner had an option (never exercised) to purchase up to 19.9% of Warner Music - also not a party to this suit. See David A. Vise, *Time Warner Sells Music Unit to Bronfman for $2.6B*, Wash. Post, Nov. 24, 2003. Warner Music owned Word Entertainment, not a party to this suit either. See 10-Q filing for Warner Music Group, at 7 (June 13, 2005), *available at* http://www.sec.gov/Archives/ edgar/data/1319161/000104746905017103/0001047469-05-017103-index.htm. Word Entertainment had an exclusive distribution contract with M2 Communications, a small Christian music label and a party to this suit. See Word Entertainment, *available at* http://www.wmg.com/recordedmusic/?promo=24020007.

In sum, then, I had no interest "however small" in the subject matter in controversy. Instead, I had an interest in a company (a) that had an *option* to purchase 19.9% of a company (b) that owned a company (c) that *contracted* with a ***3* party to this suit. Such an indirect interest does not require recusal. See *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir.2000) ("Disqualification is not required on the basis of remote, contingent, indirect or speculative interests.") (citations omitted). Indeed, M2 Communications was not required to list, and did not list, Time Warner or Warner Music on its Federal Rule of Appellate Procedure 26.1 disclosure, which requires the parties to list only parent corporations and corporations that own 10% of the entity's stock.

Accordingly, I had no financial interest in the subject matter of this suit that required recusal under § 455(b). Nor, given the remote nature of my interest, could my impartiality reasonably have been called into question, and thus recusal is not required under § 455(a).

***4* BEEZER, Circuit Judge, specially concurring:

I concur in the court's order denying the motion to recall the mandate and the denial of the motion for

sanctions. Because the mandate is not recalled, I believe we have no jurisdiction to address the challenge to Judge Pregerson's participation in this appeal.

M2 Software, Inc. moves the court for an order recalling the mandate and vacating the opinion. Appellant's counsel asserts that Judge Pregerson owns stock in Time Warner, Inc. and that such ownership required his recusal from participation in the decision of the case pursuant to 28 U.S.C. § 455.

Our authority to recall a mandate is to be "exercised only in extraordinary circumstances" and the "sparing use of the power demonstrates that it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). When a motion to recall a mandate is based on allegations of fraud on the court or allegations of misconduct affecting the integrity of the judicial process, the harm must be "gross" and enforcement of the judgment "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *overruled on other grounds*, *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976).

**5 Nothing presented by M2 Software suggests perpetration of fraud, gross misconduct or that enforcement of the judgment *870 would be manifestly unconscionable. Nor is the motion to recall the mandate "grounded in any real infirmity in our previous decision, either when it was entered or when it is viewed in light of later Supreme Court decisions." *Nevius v. Sumner*, 105 F.3d 453, 460-61 (9th Cir.1996). The Supreme Court has twice considered the opinions of this panel in this matter and has twice denied certiorari. The interests of finality and repose balanced against the claims of M2 Software require denial of the motion to recall the mandate.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-55957
D.C. No. CV-00-02853-AHM
Central District of California, Los Angeles

Filed August 21, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

MADACY ENTERTAINMENT, a corporation; HANDLEMAN COMPANY, a corporation; SFX ENTERTAINMENT, a corporation, Defendants-Appellees.

***1** ORDER

Before PREGERSON, CANBY, and BEEZER, Circuit Judges.

Appellant M2 Software's motion to recall the mandate and vacate the opinion in the above case is DENIED. M2 Software's request that the recusal motion be assigned to a new panel is DENIED. Madacy Entertainment's motion for sanctions against M2 Software is also DENIED.

***2** PREGERSON, Circuit Judge, specially concurring:

I concur in the court's order.

To set the matter straight, at the time this case was assigned to this panel and at the time we decided it, I owned an equitable interest in Time Warner. Time Warner was not a party to the suit. Unbeknownst to

me, Time Warner had an option (never exercised) to purchase up to 19.9% of Warner Music-also not a party to this suit. See David A. Vise, *Time Warner Sells Music Unit to Bronfman for $2.6B*, Wash. Post, Nov. 24, 2003. Warner Music owns Warner Special Products, not a party to the suit either. See Warner Special Products FAQ's, *available at* http://www.warner specialproducts.com/wsp/ wcm_help/helpfaq.jsp. As indicated on the allegedly infringing CDs at issue in this case, Warner Special Products manufactured, produced, and licensed music for a division of Madacy, a party to this suit.

In sum, then, I had no interest "however small" in the subject matter in controversy. Instead, I had an interest in a company (a) that had an *option* to purchase 19.9% of a company (b) that owned a company (c) that manufactured, produced, and licensed music for a corporate division of a party to this suit. Such an indirect interest does not require recusal. See *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir.2000) ***3* ("Disqualification is not required on the basis of remote, contingent, indirect or speculative interests.") (citations omitted). Indeed, Madacy was not required to list, and did not list, Time Warner or Warner**871* Music on its Federal Rule of Appellate Procedure 26.1 disclosure, which requires the parties to list only parent corporations and corporations that own 10% of the entity's stock.

Accordingly, I had no financial interest in the subject matter of this suit that required recusal under § 455(b). Nor, given the remote nature of my interest, could my impartiality reasonably have been called into question, and thus recusal is not required under § 455(a).

***4* BEEZER, Circuit Judge, specially concurring:

I concur in the court's order denying the motion to recall the mandate and the denial of the motion for sanctions. Because the mandate is not recalled, I believe

we have no jurisdiction to address the challenge to Judge Pregerson's participation in this appeal.

M2 Software, Inc. moves the court for an order recalling the mandate and vacating the opinion. Appellant's counsel asserts that Judge Pregerson owns stock in Time Warner, Inc. and that such ownership required his recusal from participation in the decision of the case pursuant to 28 U.S.C. § 455.

Our authority to recall a mandate is to be "exercised only in extraordinary circumstances" and the "sparing use of the power demonstrates that it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). When a motion to recall a mandate is based on allegations of fraud on the court or allegations of misconduct affecting the integrity of the judicial process, the harm must be "gross" and enforcement of the judgment "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *overruled on other grounds*, *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976). ***5*

Nothing presented by M2 Software suggests perpetration of fraud, gross misconduct or that enforcement of the judgment would be manifestly unconscionable. Nor is the motion to recall the mandate "grounded in any real infirmity in our previous decision, either when it was entered or when it is viewed in light of later Supreme Court decisions." *Nevius v. Sumner*, 105 F.3d 453, 460-61 (9th Cir.1996). The Supreme Court has twice considered the opinions of this panel in this matter and has twice denied certiorari. The interests of finality and repose balanced against the claims of M2 Software require denial of the motion to recall the mandate.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56602
D.C. No. CV-02-01588-AHM
Central District of California, Los Angeles

Filed October 26, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

M2 COMMUNICATIONS, L.L.C., a limited liability company; JEFF MOSELEY, an individual; GAYLORD ENTERTAINMENT, INC., a corporation, Defendants-Appellees.

***1* ORDER

Before: Judge PREGERSON, CANBY, and BEEZER, Circuit Judges.

Judge Pregerson has voted to deny appellant's petition for rehearing en banc. Judges Canby and Beezer have recommended that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petition for rehearing en banc filed September 28, 2006 is DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-55957
D.C. No. CV-00-02853-AHM
Central District of California, Los Angeles

Filed October 26, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

MADACY ENTERTAINMENT, a corporation; HANDLEMAN COMPANY, a corporation; SFX ENTERTAINMENT, a corporation, Defendants-Appellees.

***1* ORDER

Before: Judge PREGERSON, CANBY, and BEEZER, Circuit Judges.

Judge Pregerson has voted to deny appellant's petition for rehearing en banc. Judges Canby and Beezer have recommended that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See. Fed. R. App. P. 35(b).

The petition for rehearing en banc filed September 28, 2006 is DENIED.

APPENDIX E

UNITED STATES COURT DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV-02-01588-AHM (MCx)

Filed August 25, 2003

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff,

v.

M2 COMMUNICATIONS, L.L.C., a limited liability company; JEFF MOSELEY, an individual; GAYLORD ENTERTAINMENT, INC., a corporation, Defendants.

****1** JUDGMENT

****2** This Court has considered Defendant's motion for Summary Judgment and Plaintiff's motion for Summary Adjudication as to likelihood of confusion. After service of the draft Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Adjudication, neither party requested a hearing.

Therefore, on consideration of all the evidence set forth in the papers submitted, Defendants' motion is GRANTED and Plaintiff's motion is DENIED based on the Court's finding that:

1. Federal jurisdiction is appropriate because two of the claims for relief alleged in the Complaint present a federal question, namely the application of provisions of the Lanham Act, 15 U.S.C. § 1051, et seq., particularly, 15 U.S.C. §§ 1114 and 1125.

2. Under 28 U.S.C. § 1338(b), this Court is granted jurisdiction to consider the remaining claims for

relief alleged in the Complaint which relates to California and common law claims of trademark infringement and unfair competition because such claims are joined with substantial and related claims under the federal trademark laws.

3. Under the doctrine of Supplemental Jurisdiction as codified at 28 U.S.C. § 1367, this Court has jurisdiction to consider the California and common law claims of trademark infringement, trade name infringement, and unfair competition.

4. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because Defendant resides in this district, and the acts complained of occurred within this district.

5. There is no genuine issue as to any material fact.

6. There is no likelihood of confusion as between Plaintiff's M2 trade name and M2 branded products and services and Defendant's M2 Communications trade name and M2.0 branded Christian music products. Specifically, Plaintiff's 1st – 7th claims (trademark infringement under 15 U.S.C. § 1114, common law trademark ***3* infringement, false designation of origin under 15 U.S.C. § 1125, trade name infringement under Cal. Bus. & Prof. § 14402, common law trade name infringement, unfair competition under Cal. Bus. & Prof. § 17200, and common law unfair competition) all rely on the same likelihood of confusion determination. Plaintiff's 8th claim for relief was raised against defendant Gaylord Entertainment Company ("Gaylord") only and Gaylord has already been dismissed by this Court for lack of personal jurisdiction.

7. In the Ninth Circuit, the likelihood of confusion analysis is analyzed through the "Sleekcraft" factors: 1) strength of the mark; 2) relatedness of the goods; 3) degree of similarity of the marks; 4) evidence of actual confusion; 5) marketing channels; 6) degree of purchaser care; 7) defendant's intent in selecting the

mark; and 8) likelihood of expansion of the product lines. AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979).

8. To prevail on Defendant's Summary Judgment Motion, Plaintiff must "create a genuine issue thaqt confusion is probable, not simply a possibility." Cohn v. Petsmart, Inc., 281 F.3d 837, 842 (9th Cir. 2002) (quotation omitted).

9. After analyzing each of the Sleekcraft factors, the undisputed evidence establishes that Plaintiff cannot satisfy its burden of proof in this case as to likelihood of confusion under either forward or reverse confusion theories. Accordingly, as a matter of law, judgment is hereby entered in favor of Defendant on all claims.

10. After a review of all evidence presented, Defendant's request for attorney's fees pursuant to 15 U.S.C. § 1117(a) is DENIED. Defendant may submit a bill of costs in accordance with Local Rule 54-3. ***4*

11. There is no just reason for delay in the entry of this Judgment, and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk of this Court is directed to enter this Judgment upon the docket forthwith.

DATED: August 25, 2003
s/ A. HOWARD MATZ
United States District Judge

APPENDIX F

UNITED STATES COURT DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV-00-02853-AHM (MCx)

Filed May 30, 2003

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff,

v.

MADACY ENTERTAINMENT, a corporation, HANDLEMAN COMPANY, a corporation, and SFX ENTERTAINMENT, a corporation, Defendants.

****1** JUDGMENT

****2** This action came on for trial before the Court and a jury, the Honorable A. Howard Matz, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED
1. that plaintiff M2 Software, Inc. take nothing;
2. that the action against defendants Madacy Entertainment Group, Inc. and Handleman Company be dismissed on the merits; and
3. that defendants Madacy Entertainment Group, Inc. and Handleman Company recover of plaintiff M2 Software, Inc. their costs of action.

Dated at Los Angeles, California, this 30 day of May, 2003,

/s A. HOWARD MATZ
United States District Court Judge

APPENDIX G

Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

28 U.S.C. § 455

Disqualification of justice, judge, or magistrate judge.

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization

is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

APPENDIX I

28 U.S.C. § 46

Assignment of judges; panels; hearings; quorum.

a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95–486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment

pursuant to section 294 (c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or

(2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

APPENDIX J

28 U.S.C. § 144

Bias or prejudice of judge.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

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No. 06-845

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In The

Supreme Court of the United States

M2 SOFTWARE, INC.,

Petitioner,

v.

MADACY ENTERTAINMENT and
M2 COMMUNICATIONS, L.L.C., et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LARRY W. MCFARLAND, ESQ.
Counsel of Record
DAVID K. CAPLAN, ESQ.
KEATS MCFARLAND & WILSON LLP
9720 Wilshire Blvd., Penthouse Suite
Beverly Hills, California 90212
Tel. (310) 248-3830

Attorney for Respondent
M2 Communications, L.L.C.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTION PRESENTED

1. Whether a Circuit Court of Appeals must assign a new panel to consider a motion, filed after the mandate was issued, under 28 U.S.C. § 455 where it is alleged that there was an appearance of bias.

LIST OF PARTIES AND RULE 29.6 LISTING

Respondent M2 Communications, L.L.C.'s ("Respondent") name was changed to INO Records, L.L.C. It is a wholly owned subsidiary of Integrity Media, Inc.

As the question presented does not involve the Ninth Circuit's decision to dismiss defendant Jeff Moseley for lack of jurisdiction, *see M2 Software, Inc. v. M2 Communications, L.L.C.*, 149 Fed.Appx. 612, 615 (9th Cir. September 12, 2005), *reh'g en banc denied* (9th Cir. Nov. 1, 2005), he is not properly listed as a real party in interest. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 579 n.3 (1986).

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BRIEF IN OPPOSITION FOR M2 COMMUNICATIONS, L.L.C.

I. STATEMENT OF THE CASE

This is a trademark infringement action brought by Plaintiff M2 Software, Inc.

M2 Software's Petition follows the Ninth Circuit's denial of its motion to recall the mandate, vacate the opinion, and reassign the underlying appeal in *M2 Software, Inc. v. M2 Communications, L.L.C.*, 463 F.3d 868 (9th Cir. 2006) (*see* Petitioner's Appx. "A") (hereinafter "*M2 Communications*") and denial of Petitioner's request for a rehearing *en banc* of the issue (*see* Petitioner's Appx. "C").

M2 Software's motion is based on the fact that a Ninth Circuit panelist, Judge Pregerson, owned stock in Time Warner during the reporting period covered by January 1, 2003 through December 31, 2004. (Pettinari Decl., Exh. 2 at 8, 11).[1]

M2 Communications, L.L.C. is a distributor of Christian music recordings, some of which were distributed under its "M2.0" label. (SER 0159-61, 0385-86.)[2] M2 Software alleged that M2 Communications infringed M2 Software's "M2" trademark. M2 Software also alleged that

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[1] At the July 20, 2006, market valuation of Time Warner, the amount of stock owned by Judge Pregerson would have been less than 0.000022 percent of the company. (Dec. of David K. Caplan In Supp. of Opp. to Mot. to Recall Mandate, Exh. 3.)

[2] Citations to "ER" are to Petitioner's Excerpts of Record before the Ninth Circuit; Citations to "SER" are to Respondent M2 Communications' Supplemental Excerpts of Record Before the Ninth Circuit.

Word Entertainment infringed M2 Software's trademark through distribution of M2 Communications' products pursuant to a distribution agreement. (ER 65-2/16). Based on this allegation regarding Word Entertainment, M2 Software sued Gaylord Entertainment Company, the parent company of Gaylord Creative Group, Inc., which in turn owned Word Music Group, Inc. Until its sale in January 2002, Word Entertainment was a wholly owned subsidiary of Word Music Group, Inc. Thus, until January 2002, the defendant Gaylord was the great-grandparent company of the alleged infringer Word Entertainment.

In or about November 2001, three months prior to the filing of the complaint in *M2 Communications*, defendant Gaylord announced the sale of Word Entertainment to Warner Music Group. (ER 58-31). That sale closed in January 2002, one month prior to the filing of the action. (ER 58-31; ER 90-2). Gaylord informed M2 Software of this sale in March 2002. (ER 58-44). At the time that M2 Software served Gaylord with the complaint in *M2 Communications*, in June 2002, it was aware that Word Entertainment was owned by Warner Music Group, which at that time, was owned by Time Warner, Inc. Indeed, based on this sale to Warner Music Group, M2 Software claimed that Gaylord committed a fraudulent transfer under Cal. Civ. Code § 3439.01. (ER 4-17.) Notably, M2 Software never sued Warner Music Group or Time Warner. Indeed M2 Software never even sued Word Entertainment, nor its parent, Word Music Group, Inc., nor its parent Gaylord Creative Group, Inc.

On August 1, 2003, the District Court issued its Summary Judgment Order in which it granted summary judgment to M2 Communications. On September 19, 2003,

M2 Software filed its amended notice of appeal of the summary judgment and jurisdiction decisions.

On November 24, 2003, Time Warner announced that it had sold Warner Music Group (the parent of Word Entertainment).[3] (Dec. of David K. Caplan In Supp. of Opp. to Mot. to Recall Mandate, Exh. 1.)

On December 24, 2003, M2 Software filed its Opening Brief. On March 3, 2004, M2 Communications filed its Answering Brief. On April 1, 2004, M2 Software filed its Reply Brief.

On November 10, 2004, a calendar check was performed in the Ninth Circuit to assign the case for oral argument. On November 30, 2004, over nine months after the sale of Warner Music Group by Time Warner, the case was calendared for argument. On February 7, 2005, the case was argued and submitted to Judge Harry Pregerson, Judge William C. Canby, and Judge Robert R. Beezer of the Ninth Circuit. On September 12, 2005, the Ninth Circuit issued its Memorandum affirming the District Court's decisions. On September 26, 2005, M2 Software filed its petition for rehearing and rehearing en banc which was denied by the Ninth Circuit on November 1, 2005. On November 8, 2005, the mandate issued. On January 30, 2006, M2 Software filed a petition for a writ of certiorari in *M2 Communications*. The Supreme Court denied this petition on April 17, 2006. On May 12, 2006, M2 Software filed its petition for rehearing in *M2 Communications*, which was denied by the Supreme Court on June 12, 2006.

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[3] On February 27, 2004, this deal was completed. (Dec. of Mark L. Pettinari in Supp. of Mot. to Recall).

On July 7, 2006, M2 Software filed its motion to recall the mandate which is at issue in its Petition. Petitioner requested that its motion be heard by a new panel. On August 21, 2006, in a published decision the Ninth Circuit denied the motion to recall the mandate and denied the request to have the motion heard by a new panel. 463 F.3d 868. On September 28, 2006, M2 Software filed its petition for rehearing and rehearing en banc which was denied by the Ninth Circuit on October 26, 2006. The Ninth Circuit issued its mandate on November 27, 2006, which was followed by the filing of the Petition by M2 Software.

II. REASONS FOR DENYING THE WRIT

A. Introduction.

Petitioner M2 Software, Inc.'s request should be denied because it is well-established that a Court of Appeals judge may determine whether she or he is biased for the purposes of ruling on a motion made pursuant to 28 U.S.C. § 455. The plain language of the statute confirms this basic fact. Thus, the issue presented by the instant petition does not require consideration by this Court. In addition adequate procedural safeguards exist through the appellate process should an error be made by a judge during self-evaluation. Moreover, a ruling as requested by Petitioner, that a presiding judge does not have the capacity to determine her or his own bias, would wreak havoc on the courts, creating judicial gridlock, as aggrieved parties engaged in "judge shopping" upon the mere allegation of bias.

Because the ruling sought by Petitioner would contradict the plain meaning of the statute and reverse well-established precedent, this Court should deny the Petition.

B. Argument.

The plain meaning of 28 U.S.C. § 455 confirms that a judge may determine her or his bias without referring the matter to another panel. 28 U.S.C. § 455 provides that "any justice, judge, or magistrate judge of the United States *shall disqualify himself* in any proceeding in which his impartiality might reasonably be questioned." (emphasis added). A prerequisite to self-disqualification is self-evaluation. Thus, the plain meaning of the statute supports denial of the Petition.

Case law supports this plain reading of the statute. In the case relied upon by Petitioner, *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988), the Judge had self-determined the claim of alleged bias. It was the Judge's error in determining his bias based on his lack of scienter (and thereby failing to disqualify himself from the litigation) that resulted in the decision in *Liljeberg*. Thus, *Liljeberg* establishes that it is not improper for a presiding judge to self-determine her or his bias. Accordingly, *Liljeberg* supports denial of the Petition because adequate procedural safeguards for review of self-determination are provided for under existing law. *United States v. Ruzicka*, 329 U.S. 287 (1946), cited by Petitioner, is inapposite. In *Ruzicka*, the issue was resolving procedural review between a government agency and the District Courts. *Id.*, at 290.

Moreover, the sound judicial principal of *stare decisis*, that is, to stand on precedent and not to disturb settled points, should lead this Court to deny the Petition. "In light of the 'profound interests in repose' attaching to the

mandate of a court of appeals, the power [to recall the mandate] can be exercised only in extraordinary circumstances. . . ." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (*quoting* 16 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 712 (2d ed. 1996)). No extraordinary circumstances are presented by this Petition. As such, no compelling reasons exist for the Court to exercise is authority, which is to be used sparingly, as a "last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon*, 523 U.S. at 550. Thus, the Petition should be denied.

III. CONCLUSION

For the foregoing reasons, this Court should deny M2 Software's Petition.

Respectfully submitted,

LARRY W. MCFARLAND, ESQ.
Counsel of Record
DAVID K. CAPLAN, ESQ.
KEATS MCFARLAND & WILSON LLP
9720 Wilshire Blvd., Penthouse Suite
Beverly Hills, California 90212
Tel. (310) 248-3830

Attorney for Respondent
M2 Communications L.L.C.